United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

77-3011

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FOR THE SECOND CIRCUIT

Docket No. 77-3011

In the Matter of the Application of

VINCENT A. CATOGGIO

for an order of mandamus or an injunction

- against -

THE HONORABLE JACOB MISHLER, CHIEF JUDGE JACOB B. WEINSTEIN, MARK A. COSTANTINO, EDWARD R. NEAHER, THOMAS C. PLATT, HENRY BRAMWELL and GEORGE C. PRATT, District Judges of the United States District Court for the Eastern District of New York,

Respondents.

REPLY BRIEF FOR RESPONDENTS

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REPLY BRIEF FOR RESPONDENTS

The brief submitted by the petitioner, following the submission of the Memorandum for Respondents, contains one argument which was not originally raised in his petition and requires a brief response.

Petitioner seems to allege that Section 631(d) of Title 28, which requires a unanimous vote of the judges of the district court to continue in office a magistrate who has reached his seventieth birthday, is unconstitutional. Specifically, petitioner argues that "subdivision 631(d) and the manner in

which it has been utilized by the respondents in terminating petitioner's services, lack any semblance of fairness and for this reason as well as the vagueness and absence of guiding criteria, the subdivision and respondents' use of it, should be declared violative of the due process clause of the Fifth Amendment" (Br. p. 14). This claim, we submit, is wholly without substance.

The legislative history of Section 631(d), which we set out in full at pp. 8-10 of our main memorandum, shows that the mandatory retirement provision is based upon a legislative finding that "demands upon the time, attention, and energies of a magistrate will be great, and upon the belief that ordinarily a seventy year retirement age would be appropriate." Congress, accordingly, adopted a "general rule that no individual may serve as a magistrate after his 70th birthday." And, we do not understand petitioner to argue that, had Congress stopped there, the statute would not be perfectly valid. See, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Weiss v. Walsh, 324 F.Supp. 75 (S.D.N.Y. 1971), affirmed, 461 F.2d 846 (C.A. 2, 1971), certiorari denied, 409 U.S. 1129 (1973); Armstrong v. Howell, 371 F.Supp. 48 (D. Neb. 1974). Congress recognized, however, that in an "exceptional case" a magistrate would be permitted to serve if all of the judges of the district court exempted him from "the general rule" by a unanimous vote. Sen. Rep. No. 371, 90th Cong., 1st Sess. 15-16 (1967).

The purpose of the provision for a unanimous vote obviously insured that it would only be in an exceptional case that

an exemption from the declared statutory policy was allowed. This approach, like the requirement of unanimity in a criminal case, is a perfectly rational approach to insure that the declared policy of Congress is followed in the application of Section 631(d).

The cases petitioner cites in support of his argument are largely inapposite, involving as they do attacks on penal statutes for vagueness. The only case he cites that is worthy of any discussion, reflects a line of authority which plainly supports the constitutionality of the proviso to Section 631(d). In Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), the City of Seattle had enacted "a comprehensive zoning ordinance" dividing the city into six use districts and outlining the uses permitted in each district. In plaintiff's district, the ordinance permitted construction of "a philanthropic home for children or for old people," but only if "the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." Imposition of this burden on a landowner seeking to construct a philanthropic home was held to be repugnant to the Due Process Clause of the Fourteenth Amendment. In reasoning which is plainly applicable here, however, the Supreme Court distinguished an earlier case which had sustained the constitutionality of an ordinance prohibiting erection of billboards in residential areas unless a majority of the property owners in the affected block consented to the erection

of the billboards. Cusack Co. v. Chicago, 242 U.S. 526 (1917). The Supreme Court observed that in the case before it there was "no legislative determination that the proposed building [an old age home] would be inconsistent with public healthy, safety, morals or general welfare." (278 U.S. at 121). On the contrary, the Supreme Court continued (278 U.S. at 121-122):

> "[T]he legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority--uncontrolled by an standard or rule prescribed by legislative action--to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by an official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

On the other hand, in Cusack Co. v. City of Chicago, which involved the prohibition in the erection of billboards, without consent of adjacent landowners, there was a supportable legislative determination that the erection of billboards was deleterious to the public safety and in such circumstances, it was perfectly reasonable to condition exemption from the statutory policy on the consent of adjoining landowners (278 U.S. 122).

Here, like Cusack Co. v. City of Chicago, 242 U.S. 526, and unlike Seattle Trust Co. v. Roberge, 278 U.S. 116, upon which petitioner relies, Congress has made an express and supportable legislative finding and has articulated a "general rule", i.e. that it is desirable that magistrates retire at the age of 70. The exemption, for exceptional cases, upon the unanimous consent of the judges of the district court is clearly valid - as Cusack Co. v. City of Chicago, supra, makes clear.

Moreover, it must also be emphasized that, unlike both of the cases discussed above, and particularly the Roberge case, here the authority to provide for the exception is not vested in private persons who "are not bound by any official duty" (278 U.S. at 122), but in United States Judges who are sworn to fairly uphold the law. In these circumstances, there is less likelihood of arbitrary action of the kind about which the Supreme Court was concerned in Roberge. Indeed, here, the judges of the Eastern District, by adopting a policy consistent with that Congress - i.e. a policy generally requiring at age 70, have endeavored to eliminate any possibility of arbitrary application of the proviso to Section 631(d).

The foregoing discussion, of course, has assumed that, if the proviso to Section 631(d) is unconstitutional, for the reasons argued by petitioner, he would be entitled to the relief he seeks. But this is clearly not the case; for, if the proviso

for unanimous consent is struck down, we are still left with the basic provision that: "No individual may serve under this chapter having attained the age of seventy years."

Whether this basic provision is se[illegible] involves a question of determining legislative intent. [illegible]ey v. Dowd, 354 U.S. 461, 469 (1957). As the Supreme Court observed in Champlin Rfg. Co. v. Commission, 286 U.S. 210, 234 (1932):

> "The unconstitutionality of a part of an Act does not necessarily defeat ... the validity of its remaining provisions. Unless it is evident that the legislative would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Here the Federal Magistrates Act contains a severability clause (P.L. 90-578, § 501)[1/]; moreover, it seems plainly evident not only that the mandatory retirement provision "is fully operative as a law", but that Congress surely would not have been willing to sacrifice its general policy altogether simply because a proviso to be applied only to "the exceptional case" was declared invalid. See, generally, United States v. Jackson, 390 U.S. 570, 585-586; Tilton v. Richardson, 403 U.S. 672, 682 (1971).

1/ 1968 U.S. Code Cong. & Adm. News, p. 1293.

CONCLUSION

Section 631(d) is not unconstitutional on its face or as applied to petitioner. Moreover, if the proviso to Section 631(d) is invalid, the mandatory retirement clause is severable and requires that petitioner cease serving as a magistrate on June 13, 1977.

Accordingly, for these reasons, and those contained in our original memorandum, the petition for mandamus should be denied on its merits.

Dated: Brooklyn, New York
May 9, 1977

Respectfully submitted,

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